No. 95-1445

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

Supreme Court, U.S.
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UNITED STATES ex rel. HAROLD R. FINE,
Petitioner,

vs.

CHEVRON, U.S.A., INC., et al.,
Respondents.

Opposition On Behalf Of Respondents The Regents Of The University Of California And University Of California To Petition For A Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether petitioner, having obtained his information as an Inspector General employee, whose specific statutory duty was to investigate and report fraud, "voluntarily provided" the information to the government prior to commencing the *qui tam* actions for purposes of qualifying as an "original source" of the government's information under 31 U.S.C. § 3730(e)(4)(B).

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner is a former Assistant Manager in the Western Region Audit Office of the Department of Energy's ("DOE") Office of the Inspector General ("IG" or "OIG") stationed in Albuquerque, New Mexico. Shortly after his retirement on July 18, 1991, he filed seven actions under the *qui tam* provisions of the False Claims Act

("FCA"), 31 U.S.C. § 3730, including the two at issue here. (Petition, App. 5a.) In his action against The Regents of the University of California and the University of California (collectively the "University"), filed in the United States District Court for the Northern District of California, Mr. Fine conceded that his action was based on allegations and transactions which had been publicly disclosed in one or more of the ways set forth in 31 U.S.C. § 3730(e)(4)(A). (Petition, App. 48a.) Therefore, the court had subject matter jurisdiction over the *qui tam* action only if Mr. Fine was an "original source" of the government's information. 31 U.S.C. § 3730(e)(4)(B).

After the government declined to participate and the complaint was unsealed and served on the University, Mr. Fine admitted in his deposition that he obtained most of his information in his capacity as audit supervisor for the Office of the Inspector General of the DOE.

> He gleaned his information by reviewing reports turned over to the federal government, and, often, prepared by other auditors. In his deposition, Mr. Fine admits to gathering information by looking through, for example, work papers prepared by other auditors.

(Petition, App. 50a (quoting from the Order Granting Motion to Dismiss issued by the district court in Mr. Fine's action against the University).) On April 5, 1995, the district court, in response to the University's motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), which was supported by the government, as amicus, entered a final judgment dismissing the action for want of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4), on the grounds petitioner failed to qualify as an "original source" of the government's information. (Petition, App. 43a-55a.) The district court concluded that petitioner failed to meet any of the requirements for an original source, including the

requirement that before filing an action, the relator had "voluntarily provided the information to the government." 31 U.S.C. § 3730(e)(4)(B). The district court held that:

> As an auditor employed by the DOE-IG, Mr. Fine had a duty to disclose fraud to his supervisors. Indeed, that was the paramount responsibility of his position. To do otherwise would likely have been grounds for his termination; therefore, his actions cannot be construed as "voluntary." They were compelled by the nature of his employment.

(Petition, App. 51a.)

Construing the Inspector General Act of 1978 (5 U.S.C. App. 3 § 1 *et seq.*) in relation to the False Claims Act, the district court also found as an independent ground for dismissal that:

> IG employees may not bring *qui tam* actions under the FCA against any entity wherein the relevant information was obtained as part of an IG investigation.

(Petition, App. 54a.)

Following Mr. Fine's appeal and the consolidation of the appeals herein, a panel of the Ninth Circuit reversed the district court dismissals. The panel reasoned that Mr. Fine's disclosures to his supervisors were "voluntary" because: (1) "[a]ll government employees are under an obligation to disclose fraud they discover in the course of their employment to their employers;" (2) "the 1986 False Claims Act amendments were intended to encourage government employees voluntarily to disclose fraud;" and (3) "[i]t would be incongruous . . . to read the 'voluntary disclosure' requirement to bar a government employee who has gone to his supervisors to report fraud from bringing a *qui tam* action." (Petition, App. 39a-40a.)

Following the grant of petitions for rehearing, the Ninth Circuit, sitting *en banc*, vacated the panel decision and affirmed the district court's dismissals of petitioner's *qui tam* actions for lack of subject matter jurisdiction. The *en banc* majority ruled that Mr. Fine failed to qualify as an "original source" in that, as an Inspector General employee for whom the duty to investigate and report fraud was the "paramount responsibility of his position," Mr. Fine could not satisfy the jurisdictional prerequisite of having "voluntarily provided" the information to the government. (Petition, App. 7a and 12a.) Specifically,

> [t]he government employed Fine to assist in its efforts to root out, disclose, and prevent fraud, and rewarded him with a salary and benefits. . . . His performance of his job responsibilities, including the provision to his superiors of the information that later formed the basis of these two suits, was not voluntary within the meaning of the False Claims Act.

(Petition, App. 13a-14a.)

The *en banc* majority did not address whether or not Mr. Fine satisfied any other statutory requirement for an original source, *i.e.*, that his knowledge of the information was "direct and independent," nor did it address whether Inspector General Auditors are precluded, as a matter of law, from bringing *qui tam* actions. Accordingly, the sole issue presented in this petition is whether Mr. Fine, having obtained his information as an Inspector General employee whose specific statutory duty was to investigate and report fraud, "voluntarily provided" the information to the government prior to commencing the *qui tam* action. 31 U.S.C. § 3730(e)(4)(B).[1]

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[1] In addition to the majority opinion, the *en banc* decision contains: (1) a concurring opinion by Judge Kozinski which joins the majority

REASONS FOR DENYING THE WRIT

I.

The Majority *En Banc* Opinion Does Not Conflict With Any Other Circuit Court Decision and Is in Accord With the First Circuit's Opinion in *LeBlanc* Which This Court Has Already Declined to Review.

Petitioner's brief contains three citations (at pages 13, 17 and 20) to the First Circuit *LeBlanc* decision, which reached a result substantially in accord with the *en banc* majority in the instant action, but the petitioner never brings to this Court's attention the fact that a petition for a *writ of certiorari* was denied in that case. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).

LeBlanc is the only prior circuit court opinion following the 1986 amendments to the False Claims Act which directly addressed the issue of whether a government employee whose specific job responsibilities are to audit or investigate for fraud, can qualify as an original source for purposes of bringing a *qui tam* action under the False Claims Act. In *LeBlanc*, the relator was employed as a quality assurance specialist for the United States Government Defense Contract Administrative Service and had a specific duty to uncover fraud as a condition of his employment. LeBlanc's *qui tam* action was based upon information obtained from his government employment. *Id.* at 18, 20.

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opinion and refutes the dissenting opinion's narrow construction of "voluntarily provided" (Petition, App. 14a-18a); (2) concurring opinions by Judge Hawkins (also joined by Judge Kozinski) and Judge Trott that express the view that Congress could not have intended that Inspector General Auditors receive bounties as *qui tam* relators for performing the statutorily mandated job duties and, accordingly, that they should be barred from bringing *qui tam* actions (Petition, App. 18a-24a); and (3) a dissent by two members of the original panel (Petition, App. 24a-28a).

The First Circuit ruled that a government employee in LeBlanc's position could not qualify as an "original source." *Id.* at 20.

> It was LeBlanc's responsibility, a condition of his employment, to uncover fraud. The fruits of his effort belong to his employer — the government. Thus, LeBlanc was not someone with "independent knowledge of the information" as required by the statute.

Ibid.

Both *LeBlanc* and the majority *en banc* opinion in this action concluded that a government employee whose primary and express job responsibility is to audit for or report fraud to his superiors cannot, for purposes of *qui tam* jurisdiction, be an original source of the government's information about that fraud. The two circuit courts reached that result via different portions of the original source jurisdictional tests (the First Circuit concluded that LeBlanc's knowledge was not "independent" and the Ninth Circuit concluded that Mr. Fine had not "voluntarily provided" the information to the government prior to filing the actions). Nonetheless, the two circuit courts are consistent in their refusal to accord original source status to a narrow class of government employees — whose duty to uncover fraud is the primary responsibility and a condition of their employment — and neither opinion purports to bar government employees completely from pursuing *qui tam* actions or satisfying the "original source" subject matter jurisdictional tests.

Petitioner is simply incorrect in asserting that the majority *en banc* holding conflicts with the opinion of the Eleventh Circuit in *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991). The relator in *Williams* was an attorney for the United States Air Force assigned as the

Chief of the Contracts Law Division at an air base in Japan who, during the course of his employment, became aware of bid-rigging on the part of a corporation seeking telecommunications contracts with the United States. *Id.* at 1495. At the time that Williams brought his *qui tam* action, the Justice Department was asserting that *all* government employees were barred from filing *qui tam* actions based upon information acquired through their work for the government. *Id.* at 1501-1507. Thus, the Eleventh Circuit's opinion in *Williams* addresses the broad general issue of whether government employees in general may bring *qui tam* actions based upon information acquired while working for the government. *Ibid.* The holding in *Williams* that the False Claims Act, as amended by the 1986 Amendments, contains no *general* preclusion against *qui tam* actions by federal employees cannot reasonably be said to conflict with the conclusion of the *en banc* majority below that Mr. Fine's particular job responsibilities as an Inspector General auditor precluded him from having "voluntarily provided" to the government information he was required to collect.[2] The relator in *Williams* was not specifically employed to uncover fraud; rather, he simply became aware of it during the course of government employment.[3]

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[2]In fact, the court in *Williams* observed that: "[A] government employee, like any other relator, can be barred from bringing a *qui tam* action if that action is based upon 'publicly disclosed' information and the employee is not an 'original source' of that information." *Id.* at 1501.

[3]Williams maintained that his investigations were not only extraneous to his job duties, they were conducted during non-work hours in the evenings and during weekends. *Id* at 1495 n.5.

II.

The Decision Below Is Not Inconsistent With the Legislative History of the 1986 Amendments to the False Claims Act.

Petitioner seeks to resurrect a distorted and erroneous interpretation in the original panel opinion of the legislative history of the 1986 amendments to the FCA which was repudiated by nine out of the eleven judges of the Ninth Circuit *en banc* majority. The flaw in the original panel's reading of the 1986 amendments was to conclude that a principal reason for the amendments was to encourage *government* employees to disclose fraud. (Petition, App. 40a.) As properly noted by the *en banc* majority, the main purpose of the 1986 amendments was to encourage *private government contractor* employees voluntarily to disclose fraud. (Petition, App. 6a-7a.) The *en banc* majority, citing numerous cases, observed that the paradigm *qui tam* case is one in which an insider at a private company brings an action against his own employer and that proper interpretation of the legislative history "suggests that Congress envisioned only this paradigm suit when enacting the current version of the *qui tam* provisions." (Petition, App. 6a.) The Senate report on the 1986 amendments to the FCA, for instance, states that "[t]he Committee's overall intent in amending the *qui tam* section of the False Claims Act is to encourage more *private* enforcement suits." S. Rep. No. 345, 99th Cong., 2d Sess. 23-24 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5288-5289 (emphasis added).[4]

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[4]There is one brief reference in the legislative history to a 1983 U.S. Merit Systems Protection Board Survey of 5,000 federal government employees which found widespread failure to report suspected fraud. *See id.* at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 5269-70. However, other than that one brief reference to the Merit Survey, *all* of the other examples and references to the failure to report fraud contained in the Senate Report expressly refer to what was clearly the central and

The *en banc* majority recognized that these cases here at issue involve the application of the FCA to a factual scenario Congress may never have envisioned, specifically, a case in which the relator was not simply a government employee but more precisely a government employee whose paramount job responsibility as an Inspector General Auditor was to disclose fraud and false claims to his supervisors. (Petition, App. 7a.) *See* 5 U.S.C. App. 3 § 4(d).[5] As to such a relator, there is nothing incongruous in reading the "voluntarily provided" requirement of the 1986 amendments as barring such a relator from qualifying as an "original source."

While it is true that Senator Grassley, a principal sponsor of the 1986 amendments, made a floor statement reported in the Congressional Record that the purpose of the "voluntarily provided" requirement is to prevent *qui tam* actions by a person who is "a source of the allegations only because the individual was subpoenaed to come forward" (132 Cong. Rec. S20,536 (daily ed. August 11, 1986) (statement of Senator Grassley)), it is improper and misleading to assert that Senator Grassley's remarks are all-inclusive. Senator Grassley's remark is quoted out of context, and it is clear when Senator Grassley's entire statement is reviewed that his comments do not constitute a comprehensive definition of "voluntarily provided." On that occasion, he also stated that "those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information" would be considered to have "volun-

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predominant concern of Congress: the failure of government contractor employees to step forward. *Id.* at 4-8, 14, *reprinted in* 1986 U.S.C.C.A.N. at 5269-73, 5279.

[5]The "principal mission" of the Office of the Inspector General is a "concern for preventing, deterring and identifying fraud, abuse and waste in agency operations and programs." S. Rep. No. 1071, 95th Cong., 2d Sess. 11-12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2686-87.

tarily" informed the government or the media. *Ibid.* Thus, he merely gave one example of a circumstance in which information would not be voluntarily provided and another where it would. Significantly, his example of what would constitute voluntary disclosure does not, by its terms, include information given to the government by government employees whose specific job responsibilities are to uncover fraud.[6]

III.

Because the Decision Below Bars as Original Sources Only a Narrow Class of Federal Employees, the Issue Raised by the Decision Below Is Not of Sufficient Importance to Warrant Review.

Petitioner greatly exaggerates the significance of the decision below by suggesting that it precludes all *qui tam* actions by federal employees. (Petition, p. 20.) To the contrary, the *en banc* majority specifically recognized with approval its prior decision in *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). *Hagood* accepted the proposition that a federal employee may bring a *qui tam* action. (Petition, App. 12a n.5.) Similarly, the First Circuit in *LeBlanc* also stated that its decision did not constitute a general preclusion of *qui tam* actions by federal employees. *LeBlanc,* 913 F.2d at 20.

Relying on a common sense, dictionary-based interpretation of "voluntary," the *en banc* majority opinion excludes as original sources only a narrow class of federal employees who operate outside the paradigm of the *qui tam* plaintiff

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[6] In addition, Senator Grassley's example of what would constitute voluntary disclosure is inconsistent with the language adopted by Congress which contemplates that an original source must have voluntarily provided the information to the government, rather than to *either* the media or the government, as suggested by Senator Grassley.

envisioned by Congress (*e.g.*, employees of private contractors who sue their employers). The excluded class, in the words of the *en banc* majority, "defies the paradigm." (Petition, App. 7a.) The excluded class, government IG Auditors and other federal employees specifically hired to ferret out, report and prosecute fraud against the government, defies the paradigm because it consists of government agents who are required to play a central role in the government's war against fraud[7] and who clearly neither deserve nor need the incentive of potentially "staggeringly large" recoveries in order to do what they are already specifically required and paid to do as the paramount condition of their employment. (Petition, App. 9a-10a n.3.)

Petitioner's goal is to seek an interpretation of the *qui tam* jurisdictional provisions of the FCA which authorizes all federal government employees to pursue *qui tam* actions for private gain no matter how central an official role they already play in the Executive Branch anti-fraud efforts. Petitioner has not cited any evidence of Congressional intent in the legislative history of the 1986 amendments to the FCA to authorize and encourage private *qui tam* actions by government IG Auditors. The three Florida district court opinions relied upon by petitioner[8] were decided in response to broadbrush arguments by the Justice Department seeking to disqualify all federal employees as *qui tam* relators. None of the cases evaluate whether the duties of fraud and false

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[7] See *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1144-45 (D.C. Cir. 1987).

[8] *United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992); *United States v. Stern*, 818 F. Supp. 1521 (M.D. Fla. 1993); *United States v. Enriquez*, No. 90-6105-CIV, 1991 U.S. Dist. LEXIS 15972 (S.D. Fla. July 12, 1991). All three of these cases involved the same relator, Leon Weinstein, a former Inspector General Investigator for the Department of Health & Human Services.

claims investigators, specifically empowered and required by statute to disclose fraud to their supervisors, render their disclosures involuntary for purposes of 31 U.S.C. § 3730(e)(4)(B).

The *qui tam* jurisdictional holdings of the *en banc* majority, although clearly correct, may raise issues for consideration in future cases as to the precise line of demarcation between disclosures which are voluntary and those which are not.[9] The *en banc* majority specifically declined in this case to go beyond its specific statutory construction to engage in a philosophical inquiry into the meaning of "voluntary." (Petition, App. 10a.) Presumably, in future cases, the line of demarcation will emerge; if conflicts among circuits occur, review by this Court may eventually be appropriate, but there is no need at this time for the Court to review the single narrow issue raised by petitioner.

IV.

The *En Banc* Majority Opinion Does Not Give Rise to a Perverse Incentive; if an IG Auditor Were to Bring a *Qui Tam* Action Based Upon Non-Public Audit Information, the Action Would Still Be Barred.

Petitioner contends that construing the original source "voluntarily provided" requirement to disqualify Inspector General employees creates a perverse incentive: it encourages such employees to file *qui tam* actions as soon as

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[9] For example, for purposes of refining the line of demarcation between voluntary and involuntary disclosures to the government, that it should be proper to distinguish between the core duty and mission of an Inspector General Auditor to ferret out and report fraud for the Executive Branch and the incidental duty of a state to monitor and report any fraud that comes to light while administering a major federal entitlement program, such as Medicaid. *But see United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984).

possible before the information gained from their investigation is publicly disclosed. (Petition, p. 15.) This argument assumes, incorrectly, that absent public disclosure, Inspector General Auditors would be entitled to appropriate such information for purposes of filing *qui tam* actions. Since public disclosure was conceded in these cases, the *en banc* majority was not required to and did not consider whether the False Claims Act permits *qui tam* actions by Inspector General Auditors based upon non-public information gained from their government employment. However, if an Inspector General auditor tried to bring a *qui tam* action based upon such non-public information, such an action would still be barred under one or more of the following rationales.

First, such an action would be barred under the reasoning in Judge Trott's concurring opinion below construing the False Claims Act in relation to the Inspector General Act, 5 U.S.C. App. 3 § 1 *et seq.* (Petition, App. 19a-22a.) Contrasting the intolerable conflicts of interest presented to inspector general employees between their duties under the Inspector General Act and the enticement of bounties under the False Claims Act, Judge Trott concludes, in reliance upon the statutory construction principles in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring), that Congress could never have intended that such Inspector General employees be entitled to use information from their audits and investigations, whether publicly disclosed or not, to pursue *qui tam* actions. (Petition, App. 21a-22a.)

Second, such an action would be barred under the agency and related rules referred to in the dissenting opinion below that preclude an employee from pursuing a business opportunity learned through his employment without notifying his employer and giving his employer a chance to pursue that opportunity. (Petition, App. 27a.)

Finally, if the foregoing rationales were not accepted, such an action would still be barred under separation of power principles. Construing the *qui tam* provisions of the False Claims Act to authorize private bounty hunting by federal fraud investigators, using information obtained from official investigations, would impermissibly undermine the Executive Branch in violation of separation of powers principles. *See Mistretta v. United States*, 488 U.S. 361, 382 (1989) ("[W]e have not hesitated to strike down provisions of law . . . that undermine the authority and independence of one or another coordinate Branch.").

Although courts which have considered the issue to date, applying the constitutional separation of powers analysis set forth in *Morrison v. Olson*, 487 U.S. 654 (1988), have ruled that the *qui tam* provisions of the False Claims Act do not impermissibly infringe upon Executive Branch enforcement prerogatives, none of these cases have involved government employees specifically hired to investigate for fraud.[10]

This Court in *Morrison* held that the Ethics in Government Act restrictions on the Executive Branch power to supervise and remove independent counsel did not violate separation of powers principles. *Morrison*, 487 U.S. at 696-697. After analyzing the particular provisions of that Act, including the requirement that no action can be commenced without a specific request by the Attorney General,

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[10] *See e.g., United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 749-755 (9th Cir. 1993), *cert. denied*, ____ U.S. ____, 114 S.Ct. 1125, 127 L.Ed.2d 433 (1994); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1154-1155 (2d Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 2962, 125 L.Ed.2d. 663 (1993); *United States Dept. of Housing ex rel. Givler v. Smith*, 775 F. Supp. 172, 176-178 (E.D. Pa. 1991); *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615, 620-622 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 610-613 (N.D. Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters Inc.*, 714 F. Supp. 1084, 1086-96 (C.D. Cal. 1989).

this Court concluded that the Attorney General retained "sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696.

While the Executive Branch may maintain "sufficient control" of False Claims Act litigation where *qui tam* actions are brought by government contractor employees or government employees who are not hired specifically to investigate or prosecute fraud, no control would be possible if the Executive Branch's own fraud and false claims investigators, or, say, an assistant United States attorney, were permitted to rush to the courthouse with non-public information from a pending investigation to file a *qui tam* action, thereby laying claim to some 30 percent of the government's recovery. Lacking control, the President would not be able to carry out his constitutional duty to enforce the FCA. As is stated in *Buckley v. Valeo*, 424 U.S. 1 (1976), "[a] lawsuit is the ultimate remedy for a breach of the law, and it is to the President . . . that the Constitution entrusts the responsibility to 'take care that the law be faithfully executed.' Art. III, § 3." *Id.* at 138. All of the "perverse incentives" quoted with approval by the *en banc* majority from the *amicus* brief of the United States, quoted below, also illustrate how *qui tam* actions by employees of the Office of the Inspector General would impermissibly undermine the Executive Branch. (Petition, App. 12a-13a.)[11]

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[11] Such employees would have incentives:

> "[T]o spend work time looking for personally remunerative cases . . . rather than doing their assigned work; to conceal information about fraud from superiors and government prosecutors so that they can capitalize on it for personal gain; to race the government to the courthouse to file ongoing audit and investigatory matters as *qui tam* actions before those cases have been sufficiently developed by the government to justify a lawsuit, thus prematurely tipping off the target, undermining the likely effectiveness of the case, and

The civil and criminal investigative powers conferred by Congress upon the Inspector General were intended to aid in the enforcement of the laws by the Executive Branch. Permitting the use of the sovereign's police and investigative powers for private gain would undermine both the Executive's authority and public confidence in the integrity of the law enforcement process. *Cf. Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 814 (1987).

If the federal employees who have been hired specifically to investigate, audit or prosecute criminal or civil fraud actions on behalf of the United States can use information gained from their employment to file *qui tam* actions for private gain, the President could neither adopt nor implement a coherent enforcement policy; decisions regarding the commencement of suit, litigation strategy, intervention, settlement and dismissal would be governed more by the self-interest of the employees concerned than by the President's law enforcement policy. The result would be frustration,

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> diverting unnecessarily up to 30% of the government's recovery to the government employee; and to use the substantial powers of the federal government conferred upon public investigators . . . to advance their personal financial interests. Contractors will be deterred from cooperating with Inspector General investigations and audits because they fear, legitimately, that their confidential work papers will be appropriated by Inspector General employees for their personal use in filing *qui tam* actions, rather than for legitimate governmental functions. Criminal prosecutions will be seriously compromised, since IG employees are often the government's prime witnesses in criminal and civil fraud cases, and their personal interest in the outcome of their audits and investigations will make their testimony highly impeachable. Public confidence in the integrity and impartiality of government audits and investigations will necessarily decrease."

(*Ibid.* (quoting the *amicus* brief of the United States in Support of Defendants-Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc at 8-9).)

not support, of the Executive Branch's anti-fraud claims, thereby defeating the very purpose of the 1986 Amendments.

In sum, the "perverse incentive" posited by petitioner is unfounded, and, as a hypothetical issue, is not a proper subject for review by this Court.

CONCLUSION

For reasons set forth above, we respectfully submit that the petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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